Supreme Court, U.S.
FILED

OCT 28 2010

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No. 10-897

In The

Supreme Court of the United States

Janice Gilmore

V.

Macy's Retail Holding, 09-1695; 09-3441

On Petition For Writ Of Certiorari
To the United States Court of Appeals - Third circuit

Petition For Writ Of Certiorari

Petitioner Janice Gilmore
12 N. New Hampshire Avenue
Atlantic City, N. J. 08401
609 348-6225

Respondent Jeff Siegel
MORGAN, BROWN & JOY LLP
200 State Street
Boston, Massachusetts 02109-2605
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Can a party amend complaint after the pre-trial order has been issued, when the trial court permit's the opposing party to conduct deposition on the proposed new issues?

Can a party be allowed the use of supporting documentation that was late, but prior to pretrial order, when submitted to defense and the court, if the court's demand for them proceeded after the acceptable timeframe?

Should a party be allowed to receive their equal back pay due to the opportunity to present that argument at trial?

Should a party be allowed to survive summary judgment when the proceedings deny that party the opportunity to argue that case?

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1. Reason for granting the Writ Of Certiorari

Appendix
Opinion and denial of rehearing from 3rd Circuit Appellate Court

Opinion of District Court of New Jersey, Camden

March 5th 2009 Notice of Appeal was filed with the United States District Court of New Jersey city of Camden. The filing fee of $455.00 was paid in full. This filing fee was for the jury's verdict on February 10th 2009. This was docketed in the 3rd Circuit Appellate Court on March 12, 2009.

On October 8th 2009 I had to pay an additional $455.00 for filing fees for the appeal on the same case. This was to appeal the tax cost for the same jury verdict mentioned above because the defendant did not file a timely tax cost motion to the District Court in Camden, New Jersey. Dispite the untimelyness of the tax cost filed by the defendant they were granted their request by the district court without mention of timelyness and I was burdened with the tax cost filing fee of an additional $455.00 for same. This was docketed in the 3rd Circuit Appellate Court on August 5th, 2009 pending, and with the clear understanding through motions, that I must pay the additional $455.00 that was paid on October 8th 2009.

The separated appeals were consolidated in the Appellate court of the Third Circuit in Philadelphia Pennsylvania.

On June 30, 2010 the 3rd Circuit Appellate Court affirmed the District Court of Camden, New Jersey's verdict. On July 14, 2010, (docketed date) I filed a timely petition to the 3rd Circuit Appellate for a rehearing and this petition was denied on July 30th 2010.

Citations of the reports of Opinions and Orders docket dates

04/27/2009 Clerk Order deferring action on Appellant's motion for transcripts as the government's expense and Appellee's response to said motion . Appellant is directed to file and application to proceed informa pauperis for the purpose of transcripts within 14 days of the date of this order., filed. (CJG)

05/27/2009 Clerk Order, motion and response are deferred. Appellant is directed to file an application to proceed in forma pauperis for the purpose of transcripts within fourteen 14 days for the date of this order filed. (DW)

06/09/2009 Clerk Order vacating clerk order filed on May 27, 2009 as it was entered in error. Filed. (CJG)

07/31/009 Clerk Order no action will be taken on motion for extension of time to file notice of appeal, filed by Applicant Janice Gilmore, and document will be forwarded to the district court for it's consideration. Pursuant to Fed.R App. 26 b 1, a court of appeals may not extend the time for filing a notice of appeal, filed. (CJG)

08/19/2009 Order (Smith, Circuit Judge) denying motion requesting transcript at government's expense filed by Appellant Janice Gilmore. Appellant has failed to make any showing that this appeal presents a substantial question. Appellant's motion to proceed informa pauperis for the purpose transcripts is denied as moot. A briefing schedule will issue, filed . Panel No. DLD-287. Smith, Authoring Judge. (CJG)

08/25/2009 Clerk Order consolidating the Appeals at Nos. 09-1695 and 09-3441 for the all purposes. The briefing schedule issued in No. 09-1695 is hereby vacated. A consolidated briefing schedule will be issued once al/l case opening forms are filed, filed. 09-1695, 09-3441 Edited 8/25/2009 by SDT (CJG) (iv)

10-05-2009 Order (Smith, Circuit Judges) denying Motion to reconsider order filed by Appellant Janice Gilmore, filed. Smith, Authoring judge. (CJG)

01-14-2010 Order to court reporter Ms. Lisa, Marcus in 09-1695, 09-3441 directing transcripts, ordered on 01/13/2010, to be filed by 02/16/2010. 09-1695, 09-3441 CJG

03-08-2010 Order (clerk) granting Motion for extension of time to supplement the Appendix filed by Appellee Macy's Retail Holdings Inc. on or before March 19, 2010. Filed 09-1695, 09-3441 CJG

04-08-2010 Non Compliance Order issued to Appellant Janice Gilmore in 09-1695, 09-3441 regarding the reply breif and supplemental appendix filed on 04/02/10. Please open the attachment for the full text of the order. Compliance due by 4-22-10 09-1695, 09-3441 (MS)

06-09-2010 Order (clerk) referring to the merits panel (1) Appellant's motion for leave to file supplemental appendix, (2) Appellees response; (3) Appellant's reply. Send To Merits Panel. Filed. See order for full text NF

06-09-2010 Not Precedential Per Curam Opion Coram: Slovitar, Chargares and Weis Circuit Judges. Total pages 12. 09-1695, 09-3441 CJG

07-30-2010 Order (Mckee, Chief Judge, Sloviter, Scirica, Rendell, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan, Hardiman, Greenaway, Vanaskie and Weis, Circuit Judges) denying Petition for panel and en banc rehearings filed by Appellant Janice Gilmore, filed. Weis, Authoring Judge.
09-1695, 09-03441 CJG
09-28-10 Order Sloviter, Chagares and Weis 3rd circuit judges denying Gilmore's motion to recall mandate and stay the enforcement of District Court's judgment pending Petition for Certiorari , filed, Weis authorizing judge.09-1695, 09-3441 CJG (v)

I was not allowed to use errata and notes that were provided to the courts and the defense. The request for their provision continued after the acceptable date by the court for them.

I was also not allowed to use letters that confirmed the basis for my request to amend my complaint for a hostile work environment and retaliation.

On January 5th 2009, I was pulled off of the selling floor while on the clock working for defendant, and told by H/R and my supervisor that it was mandatory to take a telephone call. This was against my stated will to do so. This call turned into an unscheduled court conference That included the magistrate. The purpose of this conference was to have me deposed on the proposed issues that would apply if an amendment were granted. The deposition was performed on the proposed issues but the amendment and the repeated request for the amendment were denied.

Should the law afford me the opportunity to have the entire controversy at trial? Even if I pursued the proposed new issues through the EEOC the defense would have already deposed me. Are they privileged to this?

The Lilly Ledbetter fair pay act applies to many of the issues in my case. I was not allowed to receive back pay based on merit raises that I could not take advantage of. These raises were accumulative.

My case was severed severely. Although trial lasted for five days, it was pretty much five days of side bar. The jurors were not allowed to know or decide many of the important and relative issues of my case because the judge made the decisions for most of these issues without the jurors being exposed to their existence, including the judges change of words to jurors, Equal opportunity to Fair opportunity.

This statement of a fair opportunity instead of an equal opportunity was stated in the courtroom after the lawyers concluded their final arguments, and was stated for the purpose of presenting it to the jurors.

I was forced to pay twice for the filing fee for my appeal because the defendants attorneys did not file for tax cost during the required 14 day time frame that they should have filed. They are attorneys and there were two firms working the case together. They should not be allowed Tax cost .

I was deposed twice and not allowed to speak on the issues of discrimination that I was deposed on, while the defense repeatedly ordered roughs drafts of each deposition that would end up with errors that always benefited the defendant.

I am requesting that the Supreme court apply the law correcting the untruths that have been written and placed on me, have the defendant pay me for their infractions upon me, and remove the judgment for $4861.30 which I have already began making payments to them.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 09-1695 & 09-3441 (CONSOLIDATED)

JANICE GILMORE,
Appellant
v.
MACYS RETAIL HOLDINGS, INC.
BEFORE: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, VANASKIE and WEIS,* CIRCUIT JUDGES

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the
judges who participated in the decision of this Court, and to all the other available circuit
judges in active service, and no judge who concurred in the decision having asked for
rehearing, and a majority of the circuit judges of the circuit in regular active service not
having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.
BY THE COURT:
s/Weis
United States Circuit Judge
DATED: July 30, 2010
CJG/cc: Jeffrey S. Siegel, Esq.
Robert P. Joy, Esq.
Janice Gilmore

a.1 Selected docket entries for case 09–1695

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Filed Document Description Page Docket Text

06/30/2010 Per Curiam Opinion Filed 2 NOT PRECEDENTIAL PER CURIAM OPINION Coram: SLOVITER, CHAGARES and WEIS, Circuit Judges. Total Pages: 12. [09–1695, 09–3441]

1

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 09-1695 & 09-3441 (CONSOLIDATED)

JANICE GILMORE,
Appellant
v.
MACYS RETAIL HOLDINGS, INC.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. Action No. 1:06-cv-03020)
District Judge: Honorable Jerome B. Simandle

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 23, 2010
Before: SLOVITER, CHAGARES and WEIS, Circuit Judges
(Opinion filed: June 30, 2010)

OPINION

PER CURIAM.

Janice Gilmore appeals a final judgment by the United States District Court for the District of New Jersey entered on February 10, 2009, and an order taxing costs entered on June 19, 2009. We will affirm the District Court's decisions.

I. Background

Since 1989, Gilmore has been employed by a department

Aa.2 store operated by Appellee Macys Retail Holdings Inc. ("Macy's"). Gilmore claims Macy's discriminated against her on the basis of race (African American). After obtaining a right-to-sue letter from the EEOC in 2006, Gilmore filed an employment discrimination action in Atlantic County Superior Court under Title VII of the Civil Rights Act, see 42 U.S.C. § 2000e, and New Jersey law.

In her complaint, Gilmore alleges she began working in the Gold Bay of Macy's Fine Jewelry Department in 2001.[1] Despite expressing an interest in being promoted to the Diamond Bay, Macy's did not grant her request. When a Diamond Bay position became available in 2004, a white employee, Jeanette Rutter, received the promotion over Gilmore. Gilmore also claims she was treated more poorly than white employees in the Fine Jewelry Department because: (1) Diamond Bay associates did not request Gilmore to fill in for them during their absences, and instead preferentially requested white associates; (2) Gilmore was called upon to do "maintenance tasks," such as sizing watches, on a disproportionate basis relative to white employees; (3) Gilmore and other black employees were not given the combination to the alarm and vault for the Diamond Bay; and (4) Gilmore was not permitted to become a Counter Specialist within the Fine Jewelry Department. Gilmore eventually received a promotion to the Diamond Bay in 2007. She continues to work for Macy's.

In July 2006, Macy's removed Gilmore's action to the District Court.

Before the District Court, Gilmore was represented by privately-retained counsel. After a period of discovery, Macy's moved for summary judgment, and Gilmore opposed the motion. On March 11, 2008, the District Court granted summary judgment

1 Macy's Fine Jewelry Department is divided into three areas: the Diamond Bay, the Gold Bay, and the Watch Bay.

2 From the record, it appears Gilmore had a falling out with her counsel sometime shortly after conclusion of the trial.

a.3 to Macy's on all claims except one: a disparate treatment claim that Macy's denied Gilmore an equal opportunity to fill in for absent Diamond Bay employees on account of her race. Gilmore's action proceeded on that claim.

The District Court entered the parties' joint pre-trial order in August 2008 and scheduled trial for January 2009. In December 2008, Gilmore filed a motion to amend, seeking to raise new claims based upon events that occurred after her promotion to the Diamond Bay. The District Court denied the motion.

Gilmore's disparate treatment claim proceeded to a jury trial beginning on February 2, 2009. On February 10, 2009, the jury returned a verdict in favor of Macy's and Gilmore timely filed a pro se notice of appeal.2 As the prevailing party, Macy's moved for costs. On June 19, 2009, the District Court awarded Macy's costs in the amount of $4,861.30. Gilmore filed a second timely pro se notice of appeal. We have consolidated the appeals.

II. Analysis

In her opening brief, Gilmore challenges decisions made at all stages of the District Court proceedings. Her claims are largely conclusory, unclearly articulated, and lacking in both legal and record support. See Fed. R. App. P 28(a); see also Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993) (cursory treatment of issue in brief is insufficient to preserve the issue on appeal). Particularly in light of the voluminous record below, Gilmore has provided little basis for us to meaningfully review her claims. Nevertheless, in light of her current pro se status and our consequent liberal construction of her pleadings and submissions, see Dluhos v. Strasberg. 321 F. 3d 365, 369 (3d Cir. 2003), we have interpreted her claims as best we can understand them and have conducted a reasonable review to determine whether she has presented grounds for disturbing any decision reached by the jury or by the District Court. We conclude she has not.3

A

We exercise plenary review over the District Court's

a.4 decision granting partial summary judgment to Macy's. See Stratton v. E.I.du Pont De Nemours & Co., 363 F.3d250, 253 (3d Cir. 2004). We review the facts in the light most favorable to Gilmore and will affirm if there is no genuine issue as to any material fact and Macy's is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrettl 477 U.S. 317, 322 (1986). We will affirm the District Court's decision.

Cir. 1980) (civil litigants do not have a right to effective assistance of counsel).

March 11, 2008, the District Court granted summary judgment

First, the District Court disposed of Gilmore's "failure to promote" claim, which was based upon Macy's selection of Jeannette Rutter for a position in the Diamond Bay. Under the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), Gilmore was required to establish a prima facie case by evidence, among other things, that the person who filled the desired position had equivalent or lesser qualifications. See also Scheidemantle v. Slippery Rock

3Many of Gilmore's claims concern her former counsel's allegedly unsatisfactory performance. Gilmore's dissatisfaction with her attorney does not provide grounds for appeal. See Walker v. Sun Ship, Inc., 684 F.2d 266, 268 (3d Cir. 1982) (because a litigant "voluntarily chose this attorney as his representative in the action, . . . he cannot now avoid the consequences of the acts or omissions of this freely selected agent."); Kushner v. Winterthur Swiss Ins. Co., 620 F.2d 404, 408 (3d According to the District Court, Gilmore 4 stated in her deposition that she performed "maintenance" tasks, such as sizing watches, as frequently as a white colleague; she acknowledged that two Fine Jewelry Counter Specialists were African American; and she stated that she never requested the combinations to the Diamond Bay safe and alarm, but the African American employee who did request them received the combinations. On appeal, Gilmore does not dispute these findings.

5 According to the District Court, Gilmore's deposition testimony indicated that, when she informed her manager that a less senior employee had been given Gilmore's preferred schedule (I.e., Monday's off), the manager responded to Gilmore's request. (See Docket No. 40 at 23.) Gilmore concedes that she ultimately received Mondays off, but argues that the District Court mischaracterized her testimony because her manager granted the request only after several white employees (some less senior than Gilmore) received Mondays off.

a.5 Univ. State Sys. of Higher Educ., 470 F.3d 535, 541-42 (3d Cir. 2006). The District Court determined there was no genuine dispute that Rutter was significantly more qualified than Gilmore. Gilmore does not contest this conclusion, and we agree that summary judgment was appropriate.

Next, the District Court granted summary judgment on all but one of Gilmore's disparate treatment claims because she could not make the necessary prima facie showing that "nonmembers of the protected class were treated more favorably."[4] Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 281-82 (3d Cir. 2001). Gilmore contends the District Court reached "most inaccurate" findings on her claim that she was unfairly denied scheduling preference.[5] Gilmore cites no evidence supporting her contention and, notably, has "acknowledged that an associate may not have guaranteed days off." (See Docket No. 27 at 18.) We are not persuaded of the existence of a material dispute of fact warranting a trial on this claim.

Finally, the District Court concluded Gilmore was not entitled to pursue punitive damages, because she provided no evidence allowing an inference that Macy's acted with malice or reckless indifference to her rights.[6] See Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534 (1999). In response, Gilmore claims Macy's refused to produce a copy of her employee file, which would support her allegations concerning the number of times she consulted management about the infringement of her rights. While adequate discovery is necessary prior to a summary judgment award, see Celotex Corp., 477 U.S. at 6

The District 6 Court also concluded that Gilmore did not provide evidence of deliberate indifference to "especially egregious" conduct, as required for punitive damages under New Jersey's Law Against Discrimination. See Rendine v. Pantzer, 661 A.2d 1202, 1215 (N.J. 1995).

7 Similarly, to the extent Gilmore argues that Macy's improperly withheld other employee records, the record does not reflect that she raised any discovery dispute before the District Court.

a.6 322; Fed. R. Civ. P. 56(f), the record does not reflect that Gilmore ever previously claimed she had inadequate access to discovery.[7] Moreover, it appears that the employee file would be cumulative of Gilmore's testimony about her efforts to inform management about the alleged discrimination. We will not disturb the District Court's decision on this basis.

B.

Next, Gilmore contests the District Court's January 20, 2009 order denying her motion to amend the complaint. The District Court construed the motion as one to amend the pre-trial order under Fed. R. Civ. P. 16(e), which permits amendment "only to prevent manifest injustice." We review orders denying amendment for abuse of discretion. See Caver v. City of Trenton, 420 F.3d 243, 260 (3d Cir. 2005). We conclude the District Court acted within its discretion in denying leave to amend the pre-trial order.[8] See id.; see also Thomas v. E. J. Korvette, Inc., 476 F.2d 471, 476 (3d Cir. 1973) (appellate interference with the District Court's discretion concerning amendment of the pre-trial order should be kept to a minimum). Gilmore's claim therefore lacks merit.[9]

8The District Court concluded that adding new claims on the eve of trial would be prejudicial to Macy's and that, because Gilmore had been aware of the underlying facts for several months, the motion appeared to be tactical. Based upon these findings, we would affirm the order even if the District Court had considered the motion under the more liberal amendment provisions of Fed. R. Civ. P. 15(a). See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997) (dilatory motive and prejudice are among the grounds justifying denial of leave to amend).

9 The District Court granted Macy's permission to depose Gilmore on the proposed new claims, "without prejudice to either party's position on Plaintiff's motion to amend." On appeal, Gilmore claims she should not have been deposed a second time. However, particularly in light of the late date on which she filed her motion to amend, we find no abuse of discretion in the District Court's decision to permit Macy's to explore Gilmore's proposed new claims prior to the scheduled trial date, despite the ultimate decision not to permit amendment. For the same reason, we find no abuse of discretion in the District decision ordering Gilmore to pay the cost of the second deposition .

C.

a.7 Gilmore claims the District Court issued several erroneous rulings during trial. We consider each of her claims in turn.

I.

First, Gilmore claims error based upon the composition of the jury, stating she "could not understand why there were so many teachers on the jury, when I myself had already had so many televised oppositions to teachers and teacher related issues as the president and vice president of the Parent Advisory Counsel." (Informal Brief at 4.) A challenge to the composition of the jury must be made contemporaneously, or it is waived. See Abu-Jamal v. Horn, 520 F.3d 272, 284 (3d Cir. 2008), vacated on other grounds sub nom. Beard v. Abu-Jamal, 130 S. Ct. 1134 (2010); see also McCrory v. Henderson, 82 F.3d 1243, 1249 (2d Cir. 1996). It does not appear that Gilmore raised such an objection. In any event, Gilmore has not provided a basis for concluding that the presence of teachers on the jury caused its composition to be unconstitutional or unrepresentative of a fair cross-section of her community.[10]

ii

Gilmore next contends the Districts Court improperly excluded certain witnesses from testifying at trial. Gilmore has not specifically identified any witness she wished to present, and has not provided any relevant District Court ruling.

10 See 28 U.S.C. § 1861 et seq.; J.E.10 B. v. Alabama ex rel. T.B., 511 U.S. 127, 128-29 (1994) (litigants have an equal protection right to jury selection procedures free from discrimination); Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (litigants are not entitled to juries of a particular composition).

11 The District Court instructed the jury: 11 "Plaintiff alleges that Macy's denied her the same opportunity to work at the Diamond Bay as her white colleagues . . ., and that such denial was based upon her race." (Docket No. 116 at 17.) Gilmore's counsel specifically agreed to the District Court's phrasing of this instruction. (See Docket No. 155 at 65.)

a.8 In attempting to respond to Gilmore's claim, Macy's directs our attention to a bench ruling in which the District Court concluded, after witness proffers by Gilmore's counsel and argument by both parties, that five of Gilmore's proposed witnesses should not be permitted to testify. (S.A. 274-83.) We find no abuse of discretion in the District Court's ruling and, in any event, the ruling does not provide grounds for disturbing the jury's verdict. See Abrams v. Lightolier Inc., 50 F.3d 1204, 1213 (3d Cir. 1995).

iii.

Finally, Gilmore claims the District Court issued an erroneous jury instruction. She states, "Judge Simandle changed the words presented to the jurors to state that Janice Gilmore did not receive a FAIR OPPORTUNITY to fill in at the diamond wall in the absence of a diamond wall associate instead of the original Janice Gilmore did not receive an EQUAL OPPORTUNITY." (Informal Brief at 2.) We have reviewed the jury charge and questionnaire, and find that Gilmore's claim lacks support.[11] Moreover, so long as the jury instructions provide an accurate and fair statement of the law, the trial judge has discretion as to the style and wording employed. Douglas v. Owens, 50 F.3d 1226, 1233 (3d Cir. 1995). The District Court provided a reasonable statement of the law and Gilmore has offered no basis for concluding otherwise.

Notably, the record does not reflect that Gilmore preserved a

D.

Gilmore claims that the "facts do not support jury's verdict."[12]

12 Gilmore also complains that a juror fell asleep at trial. (Informal Brief at 3.) However, she has provided nothing to reflect that the District Court was made aware of the juror's alleged inattentiveness and, based upon our review, the issue is not apparent in the record. Gilmore's unsubstantiated claim is not a sufficient basis for disturbing the jury's verdict.

13 A party may present a claim that a jury's verdict was against the weight of the evidence by (1) filing a motion for judgment as a matter of law at the close of evidence followed by a renewed motion after trial, Fed. R. Civ. P. 50; and/or (2) filing a motion for a new trial after the jury returns its verdict, Fed. R. Civ. P. 59.

a.9 Gilmore claims that the "facts do not support jury's verdict."12 Notably, the record does not reflect that Gilmore preserved a claim that the verdict was against the weight of the evidence by presenting it to the District Court.13 See Unitherm Food Sys.,
Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 404-05 (2006); Yohannon v. Keene Corp., 924 F.2d 1255, 1262 (3d Cir. 1991). Moreover, a new trial may be granted on the basis that a verdict was against the weight of the evidence only if a miscarriage of justice would occur if the verdict were to stand. See Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992). Gilmore has not established that the verdict results in a miscarriage of justice. She argues only that witnesses testified untruthfully and that their deposition testimony conflicted with their trial testimony. Evaluation of witness credibility is part of the jury's role as factfinder. Sheridan v. E.I. du Pont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996). The record reflects that Gilmore's counsel had the opportunity to cross-examine Macy's witnesses. The jury was free to assess the credibility of the witnesses and to believe or disbelieve the facts presented by each side.

E.

Finally, the District Court ordered Gilmore to pay Macy's costs, totaling $4,861.30. Gilmore objects to a portion of that

14 Specifically, Gilmore argues she should not be taxed for the cost of deposing Sherry McCord, on the ground that Macy's did not provide her a copy of it; she objects to the cost of her second deposition, on the ground that the District Court did not allow her to amend her complaint to pursue the claim discussed in that deposition; and she objects to being charged for service of subpoenas upon, and for "lavish" transportation and meals for, four Macy's witnesses.

15 In her first notice of appeal, Gilmore purported to appeal from an order entered February 27, 2009, which partially granted Macy's motion for sanctions and for attorney's fees and costs. The Magistrate Judge subsequently specified in an order
entered November 13, 2009, that the sanctions order applies only to Gilmore's former counsel. Because these orders do not apply to Gilmore directly and because she has raised no specific dispute concerning them, we will not consider those orders here.

a.10 Award .14 In general, costs should be allowed to a prevailing party. See Fed . R . Civ. P. 54 (d) (l). We review the District Court's order for abuse of discretion. See In re Paoli R.R. Yard PCB Litig., 221 F3d 449, 458 (3d Cir. 2000). We have reviewed Gilmore's claims and none establishes an abuse of discretion. We therefore will affirm the District Court's order.[15]

III. Conclusion

We have reviewed the record and conclude that none of Appellant's remaining claims has merit. For the foregoing reasons, we will affirm the judgment of the District Court. Gilmore's motion for leave to submit a supplemental appendix is granted to the extent the proposed supplemental appendix contains documents appearing in the District Court record. We will not consider any documents that do not appear in the District Court record. See Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 2

1150, 1165 (3d Cir. 1986) ("The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court.").

1
Fed. R. Civ. P. 54(d)(1) states in relevant part: *"Costs other than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs-other than attorney's fees-should be allowed to the prevailing party."
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
JANICE GILMORE, :
Plaintiff, : Civil Action No. 06-3020 (JBS)
v.
:
MACY'S RETAIL HOLDINGS, INC. : **ORDER TO TAX COSTS**
Defendant. :

This matter comes before the Court on a motion [Dkt. Entry No. 124] by Defendant Macy's Retail Holdings, Inc. ("Defendant")
to tax costs in this matter against Plaintiff Janice Gilmore ("Plaintiff"), pursuant to Federal Rule of Civil Procedure 54(d) and Local Civil Rule 54.1. Plaintiff contests Defendant's motion for Bill of Costs.
The original matter arises out of a complaint filed by Plaintiff alleging employment discrimination. The case was tried as a jury trial before the Hon. Jerome B. Simandle starting February 2, 2009 and concluding on February 10, 2009. A judgment
for no cause of action [Dkt. Entry No. 120] was entered on February 10, 2009.
Under Federal Rule of Civil Procedure 54(d)(1), a prevailing party is entitled to costs unless the Court otherwise directs.1
Case 1:06-cv-03020-JBS -AMD Document 134 Filed 06/19/09 Page 1 of 8 PageID: 1436
2
Rule 54(d) creates a "'strong presumption' that costs are to be awarded to the prevailing party." In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 462 (3d Cir. 2000) (quoting 10 MOORES FEDERAL PRACTICE § 54.101, at 54-149); see also Delta Air Lines,

Inc. v. August, 450 U.S. 346, 352 (1981). Thus, if the judgment is silent as to costs, as it is in this matter, the presumption is that costs are taxed against the losing party. However, the prevailing party generally bears the evidentiary burden to show that a particular claimed cost is taxable. See Garonzik v. Whitman Diner, 910 F. Supp. 167, 172 (D.N.J. 1995) (declining to
award costs for particular reproduction because "plaintiffs have not shown how a copy was reasonably necessary to the trial."). In the current case, Defendant is the prevailing party within the meaning of Federal Rule Civil Procedure 54(d).

1. **Fees of the Clerk**

Defendant requests reimbursement of the $350.00 filing fee for filing a Notice of Removal with the Court. Under 28 U.S.C. § 1914(a), the required filing fee in year 2006 to file a civil action was $350.00 Additionally, the docket in this matter reflects that Defendant paid a filing fee of $350.00 when filing the Notice of Removal. This expense is an allowable taxed cost under 28 U.S.C. § 1920(1); therefore, the Clerk permits
$350.00
as a taxable cost.

Fed. R. Civ. P. 32 governs use of depositions in court 2 proceedings such as at a trial or during a hearing of a motion "as to any part or all of a deposition, so far as admissible under the rules of evidence. . . ."

3

2. **Deposition Transcripts**

Defendant requests reimbursement for deposition transcripts in the amount of $3,546.50. Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case are taxable costs under 28 U.S.C. § 1920(2).

Local Civil Rule 54.1(g)(7) states in relevant part,

> In taxing costs, the Clerk shall allow all or part of the fees and charges incurred in the taking and transcribing of depositions used at the trial under Fed. R. Civ. P. 32. 2 Fees and charges for the taking and transcribing of any

other deposition shall not be taxed as costs
unless the Court otherwise orders.
The Clerk finds the six deposition transcripts taken in this matter were necessarily obtained for "use" in the case. 28 U.S.C. § 1920. The Clerk allows Defendant to be reimbursed for
the production of six stenographic transcripts, including the Plaintiff's two deposition transcripts, and for the expenses incurred in taking those depositions.

Deponent	Amount Requested	Amount Allowed
Janice Gilmore (Day one)	$832.20	$832.20
(Transcript/Exhibits Appearance)		
(CD Depo)	$ 34.00	Denied
(Shipping/Handling)	$ 15.00	Denied

Deponent	Amount Requested	Amount Allowed
Janice Gilmore (Day two)	$1,501.00	$1,501.00
(Rough ASCII)	$ 427.50	Denied
(CD Depo)	$ 34.00	Denied
(Shipping/Handling)	$ 32.75	Denied
Elaine Van Aken	$ 288.25	$288.75
(Shipping)	$ 7.50	Denied
Jeanette Rutter	$ 179.55	$179.55
Leslie El	$ 53.55	$ 53.55
Shirley Cobb	$ 132.30	$132.30
(Copies)	$ 0.90	$ 0.90
(Delivery)	$ 7.50	Denied
Total	$3,546.50	**$2,988.25**

Accordingly, based on the evidence submitted in support of taxing the above-mentioned deposition transcripts, the Clerk does
not find Defendant's level of deposition discovery in this matter to be excessive or unreasonable, especially since these deponents
testified at trial. (Siegel Decl. ¶4.) Therefore, the Clerk finds that deposition transcripts taken in this matter were necessarily obtained for "use" in the case. See 28 U.S.C. §

1920.
The Clerk allows Defendant to be reimbursed for costs incurred for the production of stenographic transcripts including one copy of each deposition in the amount of **$2,988.25**. The reduced amount reflects a reduction of the expense for shipping
and handling the deposition transcripts to counsel and for the production of ASCII Disks. These charges are not considered a taxable cost because they are not among the categories of costs

listed in 28 U.S.C. § 1920. See Bollitier v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers, 735 F. Supp. 623,
629 (D.N.J. 1989) (denying taxation costs for mailing); see also Harkins v. Riverboat Servs., Inc., 286 F. Supp. 2d 976, 980-81 (N.D. Ill. 2003) (holding costs of ASCII disks are not recoverable as costs where regular deposition copy was also received).

3. **Trial Transcript**

Defendant requests reimbursement of a portion of a trial transcript taken on February 4, 2009. According to Defendant, on
February 4, the Court issued an oral ruling on evidentiary issues
which impacted the case. Defendant is requesting only fifteen pages of the ruling in the amount of $108.75 (15 pages at $7.25 per page). The Clerk compliments the Defendant in requesting to
be reimbursed for only fifteen pages of the transcript it ordered instead of the requesting reimbursement for the entire transcript. In many instances, parties in other matters, have requested reimbursement for the cost of the entire transcript of the Court ruling, which in this matter was $1,319.50. Pursuant to Local Civil Rule 54.1(g)(6), the Clerk allows the amount of **$108.75** to taxable costs.

4. **Fees for Service of Process and Subpoena(s)**

Defendant requests reimbursement for fees paid to a private

server to serve trial subpoenas on Sherry McCord, Fay Shaw,

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Leslie Lemoine, and Jeanette Rutter in the amount of $767.50. (Siegel Decl. ¶ 3.) Each of these individuals testified at the trial in this matter.

Although Section 1920(1) authorizes taxation of the costs of the "clerk and marshal," this Court has held that fees paid to private servers of process (service of subpoena) should be a taxable item. Hurley v. Atlantic City Police Dep't, No. 93-260, 1996 WL 549298, at *6 (D.N.J.Sept. 17, 1996). The Clerk finds that this expense is reasonable and not excessive, especially under the circumstances of this matter. It is not unusual but customary to serve trial subpoenas in a case that proceeds to trial. Therefore, the Clerk permits the entire amount of **$767.50** as taxable costs.

5. **Witness Fees**

Defendant requests reimbursement in the amount of $474.00 for expenses incurred for four witnesses who testified at trial in this matter. Each of these individuals testified at the trial in this matter. (Siegel Decl. ¶3.) Defendant requests to be reimbursed a $40.00 witness fee for each witness and travel expenses (mileage) for each witness who testified at trial. Fees for witnesses are taxable costs under 28 U.S.C. § 1920(3). Local Civil Rule 54.1(g)(1) states in relevant part, "The fees of witnesses for actual and proper attendance shall be
allowed . . . [t]he rates for witness fees, milage and

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subsistence are fixed by statute (see 28 U.S.C. § 1821)." The Clerk allows the amount of **$474.00** as taxable costs.

6. **Photocopying Costs**

Defendant requests reimbursement in the amount of $152.80 for photocopying of trial exhibits introduced at trial. Fees for exemplification and copies of papers necessarily obtained for use
in the case are taxable costs under 28 U.S.C. § 1920(4).

Under L.Civ.R. 54.1(g)(9), "(A) the fees for exemplifications and copies of papers are taxable when the documents are admitted into evidence or necessarily attached to a document required to be filed and served in support of dispositive motion. . . ." A copy of the trial exhibits was given to the jury for their deliberations, while the other copy was given to Plaintiff's counsel. (Siegel Decl. ¶ 6.) The Clerk does not find that the expense incurred in photocopying of trial exhibits was for the convenience of counsel; therefore, the Clerk allows the amount of **$152.80** as taxable costs.

7. **Docket Fees**

The Clerk allows the amount of $20.00 as a taxable cost which represents allowable docket fee of $20 under 28 U.S.C. § 1923(a).

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8. **Summary**

The following expenses are allowable as taxable costs:

1. Fees for Clerk $ 350.00
2. Deposition Fees $ 2,988.25
3. Trial Transcripts $ 108.75
4. Fees for Service/Subpoenas $ 767.50
5. Witness Fees $ 474.00
6. Photocopying Expenses $ 152.80
7. Docket Fees $ 20.00

TOTAL $ 4,861.30

9. For the reasons set forth above, Defendant Macy's motion to tax costs against Plaintiff **JANICE GILMORE** is hereby granted in the amount of **$4,861.30**.

WILLIAM T. WALSH, CLERK
By: S/John T. O'Brien
Deputy Clerk
June 19, 2009